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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 557

NATIONAL LABOR RELATIONS BOARD,
Petitioner
v.
LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

NO. 570

BURNS AND ROE, INC., ET AL.,
Petitioners
v.
LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

This brief *amicus* in support of the position of Local 825, International Union of Operating Engineers, AFL-CIO, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of

the parties, as provided for in Rule 42 of the Rules of this Court.

"The common law of labor relations has created no concept more elusive than that of 'secondary' conduct," *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386 (1969). Because this is so, it has proved extremely difficult to keep §8(b)(4)(B) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, the secondary boycott provision of the statute, within the bounds set by Congress. Two of the most critical components of the theory that has been evolved to delineate the contours of the secondary boycott are that §8(b)(4)(B) interdicts the use of certain means with an object of creating a secondary boycott and is not a " 'sweeping prohibition' of secondary conduct." *Jacksonville Terminal*, 394 U.S. at 387-388, and that there is a distinction between objects (i.e. the purpose or objective being pursued by the union) and effects (i.e. consequences, even where these are an inevitable by-product of the pursuit of the union's purposes) see, *Local 761, IUE* v. *NLRB (General Electric)*, 366 U.S. 667, 671-673 (1961). The argument presented by the Board in the instant case undermines both of these propositions. It is because of the destructive potential of the Board's position that the AFL-CIO seeks to present its views to this Court.

ARGUMENT

THE NLRB HAS FAILED TO PROVE, AS THE ACT REQUIRES, THAT THE UNION'S ACTIVITY IN THE INSTANT CASE HAD AN OBJECT OF CREATING A SECONDARY BOYCOTT

Section 8(b)(4)(B) of the National Labor Relations Act as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, provides that it is an unfair labor practice for a union to utilize certain means (engaging in, inducing, encouraging

strike action and refusals to handle; or threatening, restraining or coercing any person) to achieve certain ends (cessations of business), with the proviso that the foregoing prohibition does not invalidate the primary strike or primary picketing, see, *Local 1976 Carpenters* v. *NLRB (Sand Door)*, 357 U.S. 93, 98 (1958); *Steelworkers* v. *NLRB (Carrier Corp.)*, 376 U.S. 492, 496 (1964); *NLRB* v. *Servette*, 377 U.S. 46, 51-54 (1964).

The key to the meaning of §8(b)(4)(B) is that Congress's intent was to interdict the secondary boycott, see, 93 Cong. Rec. 4198 (Remarks of Sen. Taft); S. Rep. No. 105, 80th Cong. 1st Sess., 22; *Local 761 IUE* v. *NLRB (General Electric)*, 366 U.S. 667, 671-673 (1961); *Carrier*, 376 U.S. at 497-500; *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U.S. 612, 623-628 (1967); *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386-388 (1969). Thus, to prove a violation of that Section, the Board is required to show that a union has utilized one of the means set out in §8(b)(4)(i) or (ii) with an object of creating a secondary boycott.

In the instant case four companies, Burns and Roe, White Construction, Chicago Bridge and Iron, and Poirier and McClane, were involved in the construction of a nuclear power plant at Oyster Creek, New Jersey. White, Chicago Bridge and Poirier were the employers of all the on-site labor and all three employed operating engineers who were members of Local 825. In September 1965 White refused a Local 825 request to assign to its members the work of starting and stopping an electric welding machine and instead assigned it to members of the Iron Workers. (A. 5, 17-18)

The Board, and the court below, found that as a result of this assignment, Local 825 engaged in work stoppages directed against the three on-site contractors, and demanded

a contract from Burns and Roe, all with the object of forcing White to assign the disputed work to operating engineers in violation of §8(b)(4)(D), the jurisdictional dispute provision of the Act (A. 7, 347-350). The lower court entered an order forbidding such work stoppages and demands (A. 356-357) and that order is not challenged here.

The Board's Trial Examiner found that "All [Local 825] wanted was the work [of starting and stopping the electric welding machine], not a substitution of contractors nor a limitation of contractual relationships between the contractors," and that

> "There is not a scintilla of evidence to support [the] allegations . . . that the conduct of [Local 825], had among its objects the forcing of Chicago Bridge, Poirier and White to cease doing business with [Burns or the forcing of Burns to cease doing business with White] . . . On this record [Local 825] may be found to have two objectives, (1) to force Burns and White to agree to Local 825's contract in violation of the Board's Order in the Building Contractors' case, supra, and (2) to force White to assign the operation of the welding machine to its members. Neither objective would have been furthered by a general cessation of business among the parties." (A. 27-28, 318).

On this basis he found that there was no violation of §8(b)(4)(B).

The Board, without explicating its reasoning or adverting to the evidentiary basis for its conclusion, reversed the Trial Examiner's conclusion that Local 825's sole object was to get the work and held that one of the Union's objects was "causing a disruption of the business relationship among the various employers at the job site," the disruption being the superimposition "on [Burns] existing agreement with White [of] an added condition of performance—that the work on the welding machine had to be done by members of Local 825" (A. 8-9; Bd. Br. 17).

The court below, however, in agreement with the Trial Examiner, concluded that the union activity in question was not for an object condemned by §8(b)(4)(B):

> "[T]he circumstances [compel] the inference that the union wanted the contractor to use its influence with the subcontractor to change the subcontractor's conduct, not to terminate their relationship.
>
> "Accordingly, following our earlier decision [in NLRB v. Local 825 IUOE (Nichols Electric), 326 F. 2d 218], we hold that proof of coercive activity amounting to 'disruption of a business relationship' and aimed at causing a neutral employer to put pressure on the primary employer is insufficient, without more, to establish an effort to compel the one employer to 'cease doing business' with the other. The language of section 8(b)(4)(B) is apt to prohibit the classical secondary boycott where the attempt is made to coerce the primary employer by compelling others to stop trading or otherwise dealing with him. But we think the 'cease doing business' language is not apt to cover the objective proved here. . . ." (A. 352).

The underlying premise of the Board's brief is that §8(b)(4)(B) was designed to cover all union actions which "enroll neutral employers in a dispute not their own" (Bd. Br. 7, 9-14). Building on that premise the Board argues that in order to effectuate congressional intent it is necessary either to construe the phrase "cease doing business" to include any alteration in an existing method of doing business (Bd. Br. 8, 17-20), or to hold that any reasonably foreseeable consequence of union pressure on a neutral employer is an object of that pressure (Bd. Br. 8, 15-16).

There is an unchallenged order prohibiting pressure by Local 825 on the employers here in pursuit of work assignments. Moreover *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), holds that " the grounds upon which an administrative order must be judged are those upon which the record

discloses that its action was based." Thus the issue presented by the instant case is not whether Local 825 should be restrained from pursuing work assignments by the means it has utilized in the past, nor even whether there is a possible *rationale* which would support a finding that the conduct in question violated §§8(b)(4)(B)—it is instead whether the Board's decision is adequately based on legally defensible grounds.

1. The essential thrust of the Board's argument (Bd. Br. 14, 18) is that §8(b)(4)(B) is a "broad prohibition on secondary conduct" whose "purpose plainly includes the conduct here" and that the result reached below is therefore one which thwart's that Section's purpose.

If close linguistic analysis of the terms of §8(b)(4)(B) provided the means for ascertaining the proper interpretation of that Section this would be an easy case and affirmance of the Court of Appeals clearly required. For the Board's holding is that the term "cease doing business" includes the superimposition of any added condition of performance upon an existing method of doing business (A. 8-9). But "cease" has a recognized meaning "To leave off: bring to an end: Discontinue: Terminate" Websters Unabridged Dictionary (3rd Ed.), and it does not include a change in an ongoing relaationship since a change assumes a continuation rather than an ending. Indeed, §8(b)(4)(B) includes a prohibition on the use of the means specified in §8(b)(4)(i) and (ii) with an object of "forcing or requiring any other employer to recognize or bargain with a labor organization." This provvision makes perfect sense as long as "cease doing businesss" is given its normal meaning; it is rendered superfluous, however, by the Board's expansive construction of that phraase. Since the accepted principle is that a statute should bbe construed in a manner which preserves the meaning off all its component parts, the tradi-

tional methods of analysis leave no doubt that the Board's holding is unsound.

While these means of construction provide the most expeditious method for reaching the proper ultimate conclusion, we full agree with the Board's implicit assumption that they cannot serve here. For as the Board quite properly emphasizes, it is only after the Congressional intent which underlies §8(b)(4), and its companion §8(e), has been ascertained that the scheme of regulation inherent in these provisions can be fully comprehended, see, *National Woodwork,* 386 U.S. at 619-644. Thus our contention that the Board is in error here is not based on a disagreement concerning the insufficiency of literalism, but on this Court's decisions rejecting the Board's expansive and destructive conception of the Congressional intent. For the most recent relevant opinion, *Jacksonville Terminal,* demonstrates that all secondary conduct is not within reach of the secondary boycott prohibition (394 U.S. at 386, 387-388):

> "No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries . . . And the common law of labor relations has created no concept more elusive than that of 'secondary' conduct; . . .
>
> • • •
>
> "The 1947 Taft-Hartley amendments, 61 Stat. 140, and the 1959 Landrum-Griffin amendments, 73 Stat. 545, explicitly narrowed the scope of protected employee conduct under the National Labor Relations Act; §§8(b)(4) and 8(e) of the Act proscribed a variety of secondary activities. But Congress enacted 'no . . . sweeping prohibition' of secondary conduct. Carpenters v. NLRB, 357 U.S. 93, 98 (1958) . . . Section 8(b)(4) 'does not speak generally of secondary boycotts . . . [but] describes and condemns specific union conduct directed to specific objectives.' Carpenters v. NLRB, supra, at 98."

And *National Woodwork* 386 U.S., at 625-626 spells out the point that the secondary boycott prohibition does not reach every form of pressure which "enroll[s] neutral employers in a dispute not their own;" rather, it is one of a number of prohibitions, each of limited scope, and each providing a delimited measure of protection to neutral employers.

Thus, while it is of the most vital necessity in delineating the contours of §8(b)(4)(B) to distinguish between protected primary activity (the strike over terms and conditions of employment and supportive picketing) on the one hand and secondary conduct on the other, that distinction is not sufficient. For §8(b)(4)(B) is not a " 'sweeping prohibition' of secondary conduct," *Jacksonville Terminal*, 394 U.S. at 387-388—it interdicts the use of certain means with an object of creating a secondary boycott. Therefore, the Board and the courts are required to distinguish between the secondary boycott and other forms of secondary activity as well as between the secondary boycott and the primary strike and primary picketing. This obligation cannot be sloughed off by ascribing an intent to Congress to sweep broadly in the interest of protecting neutrals. As Mr. Justice Frankfurter noted in *Local 1976 Carpenters* (357 U.S. at 99-100):

> "It is relevant to recall the Taft Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law."

It follows *a fortiori* that the even broader policy the Board's brief purports to find in §8(b)(4)(B) cannot be imputed to Congress: "To be sure . . . Congress might be of opinion that greater stress should be put on . . . eliminating more and more economic weapons from the . . . [union's] grasp. But Congress' policy has not yet moved to this point" *NLRB* v. *Insurance Agents International* 361 U.S. 477, 500 (1960).

2. Under the controlling decisions of this Court the proper approach to §8(b)(4)(B) is to deal directly with the concept of union conduct with an objective of creating a secondary boycott. What is necessary is elucidation of the classic definition of the secondary boycott essayed by Judge Learned Hand in *Local 501 IBEW* v. *NLRB*, 181 F.2d 34, 37 (C. A. 2nd Cir., 1950), *affirmed* 341 U.S. 695. That definition in its entirety, including the sentence elided by the Board (Bd. Br. 13), is:

> "The gravamen of a secondary boycott, is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employee's demands."

The basic premise of our market economy is that those who continue to do business with each other do so because they find it mutually advantageous. The essence of the secondary boycott is the imposition of certain forms of union pressure on a neutral employer to force him to take an action which both disadvantages him and has a coercive effect on the primary. The feature which distinguishes the secondary boycott from other forms of secondary activity, such as the one with which we are concerned here, is that in the secondary boycott alone the action sought of the neutral harms him economically by depriving him of the right to

continue an advantageous relationship. On the other hand, where the union seeks a change in an existing method of doing business the action sought of the neutral does not harm him economically. Once this difference in impact on the neutral is appreciated, the Congressional decision to limit the scope of §8(b)(4)(B) to secondary boycotts is readily understood, for as Judge Hand's definition emphasizes it is the neutral's welfare which is the central concern of this provision.

As the Board notes (Bd. Br. 12-13, n. 6) the Act's prohibition of the secondary boycott authorizes it to find a violation where the union seeks a change in the neutral's method of doing business with the primary that, as a practical matter, makes it impossible for him to continue to do business with the primary. But this reinforces rather than weakens our point. For where the union demand is the equivalent of a demand to cease doing business, the policy of §8(b)(4)(B) requires its application, but where the union demand does not require the neutral to take action which is disadvantageous to him there is no reason for that Section to apply.

Thus, as Judge Prettyman recognized in *Local 770 Retail Clerks* v. *NLRB*, 296 F.2d 368, 372-373 (C.A.D.C. Cir., 1961) the fact that some changes in existing methods of doing business may come within §8(b)(4)(B) does not mean that all changes do so:

> "It may be that to force an employer to change his method of doing business with another would be to force him to cease doing business within the meaning of the clause we are now discussing, i.e., [§8(b)(4)(B)]. Certainly, however, every change in method is not equivalent to a cessation. If it be held as a matter of law that a rearrangement of methods of doing business may possibly constitute a cessation of business within the meaning of this Section, each case must depend upon its own facts. Rearrangements or changes may be

> minor or major, or part way between these extremes. A change may be so minor as not to affect the flow or nature of the business. On the other hand a change in method may be so drastic as to constitute, or necessarily cause, complete cessation of the business."

The Board makes two points in support of its contention that as a matter of law §8(b)(4)(B) reaches all changes in an existing method of doing business. First (Bd. Br. 18), it argues that any other conclusion would "nullify the broad prohibition on secondary conduct which the legislative history shows Congress to have intended." The short but complete answer to this is that this Courts decisions hold that Congress sought to ban secondary boycotts not secondary conduct generally, see pp. 7-9, *supra*. And Congress was well aware that it had simply interdicted "a strike against employer A for the purpose of forcing that employer to cease doing business with employer B . . . (with whom the union has a dispute)" S. Rep. No. 105, 80th Cong., 1st Sess., 22.

Secondarily, the Board claims (Bd. Br. 19) that its approach is necessary to prevent disguised secondary boycotts. This point is the product of an overly modest assessment of the Board's ability to establish the objectives of union conduct. A §8(b)(4)(B) object is present when a neutral is asked to cut off business relations with the primary or to take other steps which make it impossible for those relations to continue. The union's statements, together with "the nature of the acts performed shows the [union's] intent," *Seafarers* v. *NLRB (Salt Dome)*, 265 F.2d 585, 591 (C.A.D.C. Cir., 1959) quoted in *General Electric*, 366 U.S. at 674. And the Board is of course free to draw reasonable inferences from what the union has said and done taken against the background of the business relationship between the neutral and the primary and the actions other than a cessation of business open to the neutral.

Thus, just as the Board has mastered the task of distinguishing between primary and secondary objects through the traditional method of ascertaining motive, see, *Local 861 IBEW (Plauche Electric)*, 135 NLRB 250 (1962), there can be no doubt that the task of distinguishing between the secondary boycott and other forms of unlawful or unprotected activity is also well within its competence.

At an earlier point in its history the Board took the view that the task of distinguishing between primary and secondary picketing at a common situs was beyond its competence. It reacted by creating a rule of law which effectively prohibited common situs picketing whether primary or secondary, see, *Brewery Drivers (Washington Coca-Cola Bottling Works)* 107 NLRB 299 (1953), overruled in, *Plausche Electric*, 135 NLRB at 252-254. The courts refused to accept *Washington Coca-Cola*. As Judge Rives stated in *NLRB* v. *General Drivers (Otis Massey)*, 225 F.2d 205, 209 (C. A. 5th Cir., 1955) its defect was that it "elevat[ed] the Board formulated 'criteria' . . . to a vantage point from which it could in effect circumvent the statute . . ." The Board's approach here is another attempt to "in effect circumvent the statute" in the name of effective enforcement of the secondary boycott prohibition. The prophylactic rule announced in this case suffers from exactly the same defect as *Washington Coca Cola*—it does not have an adequate predicate in the Act. For this reason it, like *Washington Coca Cola*, must be rejected, compare, *Local 357 Teamsters* v. *NLRB*, 365 U.S. 667 (1961).

Unless Judge Prettyman's view in *Local 770 Retail Clerks* is rejected the conclusion reached by the Trial Examiner and the court below in the instant case must be sustained. The change in the existing business arrangements sought by Local 825 was a contract requiring White to assign the work of starting and stopping its welding

machine to an operating engineer. There is nothing to indicate that the signing of such a contract would work to the disadvantage of Burns, Chicago Bridge or Poirier, thereby forcing them to sever their relationship with White. Indeed, Local 825 represented employees of all three of the on-site contractors. Thus, a cessation of any of the business relationships between these employers and Burns would have had an adverse impact on the striking union out of all proportion to the gain sought. This being so, it is, as the Trial Examiner noted (A. 28), "totally irrational" to ascribe to Local 825 an intent to create a secondary boycott.

3. In apparent recognition of the weakness of the contention that an object to alter an existing business arrangement is always an illegal object, the Board's Brief, pp. 8, 15-16, places heavy reliance on the argument that it is sufficient to establish a §8(b)(4)(B) violation to show that a cessation of business was a reasonably foreseeable consequence of Local 825's action.

Even if this argument had merit, which as we show below it does not, see pp. 14-20, *infra*, it could not be utilized as support for the Board's decision. For there is not a word in its opinion to show that this *rationale*, which has the most critical implications for the development of secondary boycott law, is the Board's own. The Board's sole explanation for the reversal of the Trial Examiner's conclusion was predicated exclusively on its "any alteration of an existing business arrangement" theory. The "reasonably foreseeable consequence" theory is simply a post hoc rationalization of appellate counsel. Thus, as this Court stated in *Metropolitan Life Ins. Co* v. *NLRB*, 380 U.S. 438, 442-443 (1965):

> "Due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed.

> When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it. 'Phelps Dodge Corp. v. Labor Board, 313 US 177, 197. See Burlington Truck Lines v. United States, 371 US 156, 167-169; Interstate Commerce Comm's v. J-T Transport Co. 368 US 81, 93. Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action . . .' Burlington Truck Lines v. United States, supra, 371 US at 168; see Securities & Exchange Comm'n v. Chenery Corp. 332 US 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the Administrative agency.' Securities & Exchange Comm'n v. Chenery Corp., supra, 332 US at 196."

4. The "reasonably foreseeable consequences" theory is without merit though it is presented as one from authority —this Court's decisions in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 227 (1963), and *NLRB* v. *Denver Building Trades Council*, 341 U.S. 675 (1951).

In *NLRB* v. *Brown*, 380 U.S. 278, 287 (1965), Mr. Justice Brennan explained that:

> "In Labor Board v. Erie Resistor Corp., supra, we held that an employer's action in awarding superseniority to employees who worked during a strike was discriminatory conduct that carried with it its own indicia of improper intent. The only reasonable inference that could be drawn by the Board from the award

> of super-seniority—balancing the prejudicial effect upon the employees against any asserted business purpose—was that it was directed against the striking employees because of their union membership . . ." See also, *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967).

Thus *Erie Resistor* stands for the proposition that there are classes of conduct, such as the award of superseniority, as to which the only reasonable inference that could be drawn is that the employer was motivated by an improper intent.

In the instant case the class of conduct in question is a work stoppage by secondary employees growing out of a work assignment dispute. It cannot be said that the only reasonable inference to be drawn from a work stoppage by secondary employees growing out of a work assignment dispute is that the union intended to create a secondary boycott. This is demonstrated with consumate clarity by the opinions in *NLRB* v. *Local 825, IUOE (Nichols' Electric Co.)*, 326 F. 2d 213 and 326 F.2d 218 (C.A. 3rd Cir., 1964).

In *Nichols*, there was a dispute over the assignment by that employer of the operation of a power auger to members of the IBEW rather than Local 825. On two different occasions this dispute lead to work stoppages by operating engineers employed by two neutral employers (Elmhurst and Selby). The first stoppage occurred when "a number of operating engineers gathered around the vicinity of the power auger" while a Local 825 shop steward argued with a Nichols' foreman over the assignment; the second took place 6 days later when the Local 825 shop steward "summoned various operating engineers employed by Elmhurst and Selby and told them to prevent the operation of the auger. The operating engineers gathered around the machine and cited their contract with Selby as indicating that they were entitled to the work," 326 F.2d at 215.

On these facts the Board found both §8(b)(4)(D) and §8(b)(4)(B) violations. As to the latter it reasoned:

> "Thus, Selby and Elmhurst, in order to keep their employees at work, were faced with the choice of ceasing to do business with Nichols or having the work done in some other manner. Although the work was finally accomplished manually by Nichols at the request of Shelby's superintendent, Kangas, there is no indication that Respondent suggested this or any other alternative. We conclude, then, that an object of the strike was to force Selby and Elmhurst to cease doing business with Nichols." 138 NLRB at 543.

The court enforced the §8(b)(4)(D) finding but denied the Board's petition for enforcement of its §8(b)(4)(B) order:

> "The undisputed evidence . . . shows that the operating engineers left their jobs for the purpose of preventing the electricians employed by Nichols from operating the power auger and winch. There is simply no evidence that an object of this action was to force their own employers to cease doing business with Nichols. To put the matter another way, the record conclusively demonstrates that the work stoppage was merely an incidental consequence of the efforts of the engineers to prevent the operation of the power equipment by the electricians, and to compel Nichols to assign the work to them. In order to do this they had to leave their jobs, but thi sdoes not mean that in doing so they sought to compel their employers to cease doing business with Nichols. . ."
>
> "In its brief the Board argues that 'by virtue of the pressure put upon Nichols by the secondary employees' work stoppage, Nichols was forced to forsake the efficiency and economies offered by the power-driven auger, and had to fall back upon the slower and costlier method of digging each hole with manual labor.' This argument misses the mark, for to constitute unlawful secondary activity the union must exert pressure upon

the secondary employer with an object of forcing him to cease doing business with the primary employer."

* * *

"In support of its position the Board cites Retail Clerks Union Local 770 v. National Labor Relations Board, 111 U.S. App. D.C. 246, 296 F. 2d 368 (1961). But that case aids the position of respondent, for there the court held its essential that the Board provide factual support for its conclusion that an object of the work stoppage was to force a cessation of business." 326 F. 2d at 220-221.

In addition there can be no doubt that the decision in *Denver Building Trades* does not, as the Board claims, represent an application of *Erie Resistor* in the §8(b)(4) context. The question in *Denver Building Trades* was whether union picketing protesting "This Job Unfair To Denver Building and Construction Trades Council," taken against all the evidence of the background which led to the placing of the picket (see 341 U.S. at 677-679), was primary activity as the Council claimed, or activity designed to create a secondary boycott. The Trial Examiner, the Board and this Court concluded that a canvass of all the evidence supported the conclusion that the union's true object was the latter. There is absolutely no indication in this Court's opinion that it was relying on the effects of the picketing to determine the Council's object. The Court's statement that "the Council's strike, in order to attain its ultimate purpose [to have the work done by union men] must have included among its objects that of forcing Doose & Lintner to terminate [Gould and Preisner] subcontract" (341 U.S. at 688) is not as the Board would have it, an example of inferring objects from effects. For the evidence left no doubt as to the Council's desires:

"Fisher [the IBEW's business agent] said that he was willing [to sign Gould and Preisner to a union contract] but that Mr. Gould and Mr. Preisner were not willing to

sign up and that he wanted 'to get as much business away from their firm as possible.'" 82 NLRB at 1206.

The argument from *Denver Building Trades* was squarely rejected in *NLRB* v. *Carpenters (Wendnagel & Co.)*, 261 F. 2d 166 (C.A. 7th Cir., 1958). There the union had a work acquisition object which it pursued by a strike against neutral employers at a construction job site. The court held that there was no secondary boycott since there was no "evidence that the object of respondents was to force Anderson [the neutral general contractor] to replace Wendnagel with a different subcontractor who would use members of the Carpenters." 261 F. 2d at 171. It then stated:

> "The Board is mistaken in relying on N.L.R.B. v. Denver Bldg. & Const. Trade Council, 341 U.S. 675. In that case there was a long standing labor dispute between the Building Council and Gould & Preisner due to the latter's practice of employing *non-union* men on construction jobs in Denver. Doose & Lintner was the general contractor for the construction of a commercial building. Gould & Preisner was a subcontractor thereon and its employees were the only non-union workmen on the project. The Building Council commenced a strike at the project and Doose & Lintner notified Gould & Preisner to get off the job. . . .
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> "In contrast, in the case at bar we are not dealing with a non-union subcontractor. Wendnagel's coopers are union men. No reason existed in the case at bar for the replacement of Wendnagel, and respondents never demanded it. That was not their object in striking against Fruin-Colnon. They demanded only that members of Carpenters be employed by Wendnagel on the work in question rather than members of Coopers. That was their object in striking against Fruin-Colnon. They believed that their strike, by means of Anderson's influence over Wendnagel, would cause the replacement of the coopers by respondents' carpenters." 261 F.2d at 171-172.

5. The logical foundations of the "reasonably foreseeable consequences" argument are as unsound as its supposed underpinnings in authority are spurious. As he himself recognized in *Local 501, IBEW,* 181 F2d at 37-38, Judge Hand's definition is an insufficient guide to the application of §8(b)(4)(B) unless a distinction is made between objects (i.e., the purposes or objectives being pursued by the union) and effects (i.e., consequences, even where these are an inevitable by-product of the pursuit of the union's purposes). The basic means open to unions to press their demands are the strike and the picket line. In a variety of cases utilization of these means results in sanctions on a neutral employer which compel him to stop business with the primary employer. For example, in *Carrier* the union engaged in primary picketing directed at those approaching a struck plant "whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt," 376 U.S. at 499. Yet that picketing to the extent successful, obviously imposed sanctions (refusals to make deliveries by his employees) on a neutral to compel him to stop business with the primary.

Thus, if §8(b)(4)(B) is to be kept within bounds compatible with the overall structure of the Act, the Board cannot be said to have proved its case simply by showing that a strike or a picket line has secondary effects. As Judge Prettyman explained in *Salt Dome,* 265 F.2d at 590, cited with approval in *General Electric,* 366 U.S. at 673:

> "The determining factor is the objective, the intendment, of the strike. The statute forbids a strike if an object of the strike is to induce a person not the primary employer or an employee of his to take some action such as ceasing to do business with the primary employer. The cases recognize the very practical fact that, intended or not, sought for or not, aimed for or not, employees of neutral employers do take action

> sympathetic with strikers and do put pressure on their own employers . . . The question is the objective. The difference [between legality and illegality] is in whether the effect on [the neutral's] workers was an objective of the strike or was merely an incident of it." See also, *(Otis Massey)*, 225 F.2d at 208-211; *Local 770 Retail Clerks*, 296 F.2d at 373; *Houston Insulation Contractors Assn.* v. *NLRB*, 357 F.2d, 187 (C.A. 5th Cir., 1966), affirmed 386 U.S. 664.

The Board's brief, while not adverting to the well settled line between objects, purposes and objectives on the one hand and effects, incidents and consequences on the other, recognizes it by limiting its argument to the proposition that "so long as the strike has no primary aspects . . . it suffices [to prove a violation of §8(a)(4)(B)] that the cessation of business is one of the reasonably foreseeable consequences of a union's actions" (Bd. Br. 8). Without the qualifications excepting strikes with a primary aspect there can, of course, be no doubt that the foregoing would be contrary to the theory of *General Electric*. For the Court there stated that §8(b)(4) "could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity," because as the Board had explained:

> "'A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer . . .' [*Pure Oil*], 84 NLRB at 318." 366 U.S. at 675.

Thus, as both *General Electric* and *Carrier* indicate, secondary consequences are often the inevitable and inextricable by-product of the pursuit of primary objectives. This being so, it is impermissible to infer an unlawful §8(b)(4)(B) object from the reasonably foreseeable consequence of the union action. Where the union is engaged in a primary

strike or picketing, a finding of a secondary boycott object must be supported by some evidence other than the fact that there were secondary consequences, see, *Jacksonville Terminal,* 394 U.S. at 389-390. This is necessary in order to preserve the statutory dividing line between protected primary activity and the secondary boycott. As this Court stated in a related context:

> "Had Congress thought one or the other [policy] overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly." *Local 1424 Machinists* v. *NLRB (Bryan Mfr. Co.),* 362 U.S. 411, 418 n. 7 (1960).

The only escape from the foregoing argument is that while the Board is not free to extend §8(b)(4)(B) beyond proper bounds at the expense of protected primary activity, it is free to do so at the expense of creating overlapping violations for conduct which is otherwise unlawful or unprotected. To sanction this result, however, would turn §8(b)(4)(B) from a prohibition of the secondary boycott to a "'sweeping prohibition' of secondary conduct" and as this Court's decisions from *Local 1976 Carpenters* to *Jacksonville Terminal* demonstrate, the Act contains no such prohibition.

CONCLUSION

For the above stated reasons, as well as those advanced by Local 825, the judgment below should be affirmed.

Respectfully submitted,

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